Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	:	
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Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991	:	CG Docket No. 18-152; 02-278
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	:	
	:	DA No. 18-1014
	:	

COMMENTS OF JUSTIN T. HOLCOMBE

I am submitting these comments in my individual capacity as a subscriber of cellular telephone services. I also submit this in my professional capacity as an attorney for other consumers who are fed up with the constant barrage of telephone calls from businesses who either ignore the TCPA's consent requirements or continuously look for new ways to skirt them.

Initially, I would like to incorporate and reiterate the comments I submitted on June 13, 2018 in response to the Commission's prior Request for Comments regarding the D.C. Circuit's decision in *ACA Int'l v. FCC*. In these comments, I will attempt to expand on those comments to respond to the questions posed by the Commission.

I. What Constitutes an Automatic Telephone Dialing System?

The Commission seeks additional comment on what constitutes and ATDS. As I stated before, the Commission should continue to follow its 2003 reasoning on what constitutes an ATDS. The D.C. Circuit's decision in *ACA Int'l* can be squared with the Ninth Circuit's decision in *Marks*, and the FCC should do so.

My previous comments proposed an interpretation of the statutory language that is

slightly different from the one set forth in *Marks*, but the result is the same: A system that *automatically* dials stored telephone numbers is an ATDS. *Marks* proposed that the phrase "using a random or sequential number generator" modify only the word "produce." This is because telephone numbers are not stored using a random or sequential number generator, and reading this phrase to modify "store or produce" would be nonsensical. If the Commission were to require that telephone numbers to be initially *produced* using a random or sequential number generator, it would effectively read the word "store" out of the statute.

My previous comments suggested to read "using a random or sequential number generator" to modify only "to be called."[1] There are two ways to *automatically* generate numbers from a stored database for dialing, either truly at random or in some sequence (e.g., a dialing algorithm).[2] Of course, if the numbers are *not* automatically generated, a person can call stored telephone numbers by manual/cognitive selection at the time of the call, which would be *neither* randomly *nor* sequentially generated, and they certainly are not generated by the *system* (or equipment) at issue.

Under either the *Marks* reading or the one I have proposed, a system that *automatically* calls stored telephone numbers would be an ATDS. This gives proper deference to Congress' use of the word "store" and the disjunctive "or," which together mean that a system that *stores*

[1] *See Parm v. Nat'l Bank of Ca., N.A.*, 835 F .3d 1331, 1336 (11th Cir. 2016) ("'When the syntax involves something other than a parallel series of nouns or verbs, a prepositive or postpositive modifier normally applies only to the nearest reasonable referent.'") (*quoting* Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* 152 (2012)).
[2] *See also ACA Int'l v. FCC*, 885 F. 3d 687, 701 (D.C. Cir. 2018) (recognizing that "[a]nytime phone numbers are dialed from a set list, the database of numbers must be called in *some* order—either in a random or some other sequence.").

telephone numbers need not also *produce* such numbers to be an ATDS.[3] This is also consistent with the Commission's 2003 approach that "the purpose of the requirement that equipment have the 'capacity to store or produce telephone numbers to be called' is to ensure that the prohibition on autodialed calls not be circumvented."[4]

ACA Int'l does not foreclose these interpretations. *ACA Int'l* recognized that "[a]nytime phone numbers are dialed from a set list, the database of numbers must be called in *some* order—either in a random or some other sequence."[5] However, the Commission had previously stated that "[t]he hardware, when paired with certain software, has the capacity to store or produce numbers and dial those numbers *at random, in sequential order, or from a database of numbers*."[6] Looking again at the use of the disjunctive "or" [this time by the FCC], the D.C. Circuit concluded that the Commission must have considered dialing from a database as being something separate and distinct from dialing at random or in a sequence.[7] Ultimately, the D.C. Circuit determined that "[i]t might be permissible for the Commission to adopt either interpretation. But the Commission cannot, consistent with reasoned decisionmaking, espouse both competing interpretations in the same order."[8]

The *Marks* interpretation fixes the problem identified by the D.C. Circuit by reading the statute to refer to telephone numbers that are stored and automatically called without regard to whether a random or sequential number generator is used. The interpretation I previously

[3] *Bourff v. Rubin Lublin, LLC*, 674 F.3d 1238, 1241 (11th Cir. 2012) (explaining the use of the disjunctive "or").
[4] 2003 TCPA Order at ¶ 133.
[5] *ACA Int'l v. FCC*, 885 F. 3d 687, 702 (D.C. Cir. 2018).
[6] 2003 TCPA Order at ¶ 131.
[7] *ACA Int'l* at 702.
[8] *Id.* at 703.

submitted also fixes the problem identified by the D.C. Circuit by adopting an interpretation that automatically generating a telephone number from storage to be called is "using a random or sequential number generator." This is one of the competing interpretations the D.C. Circuit said might be permissible, so long as the Commission picked one and stuck with it.[9]

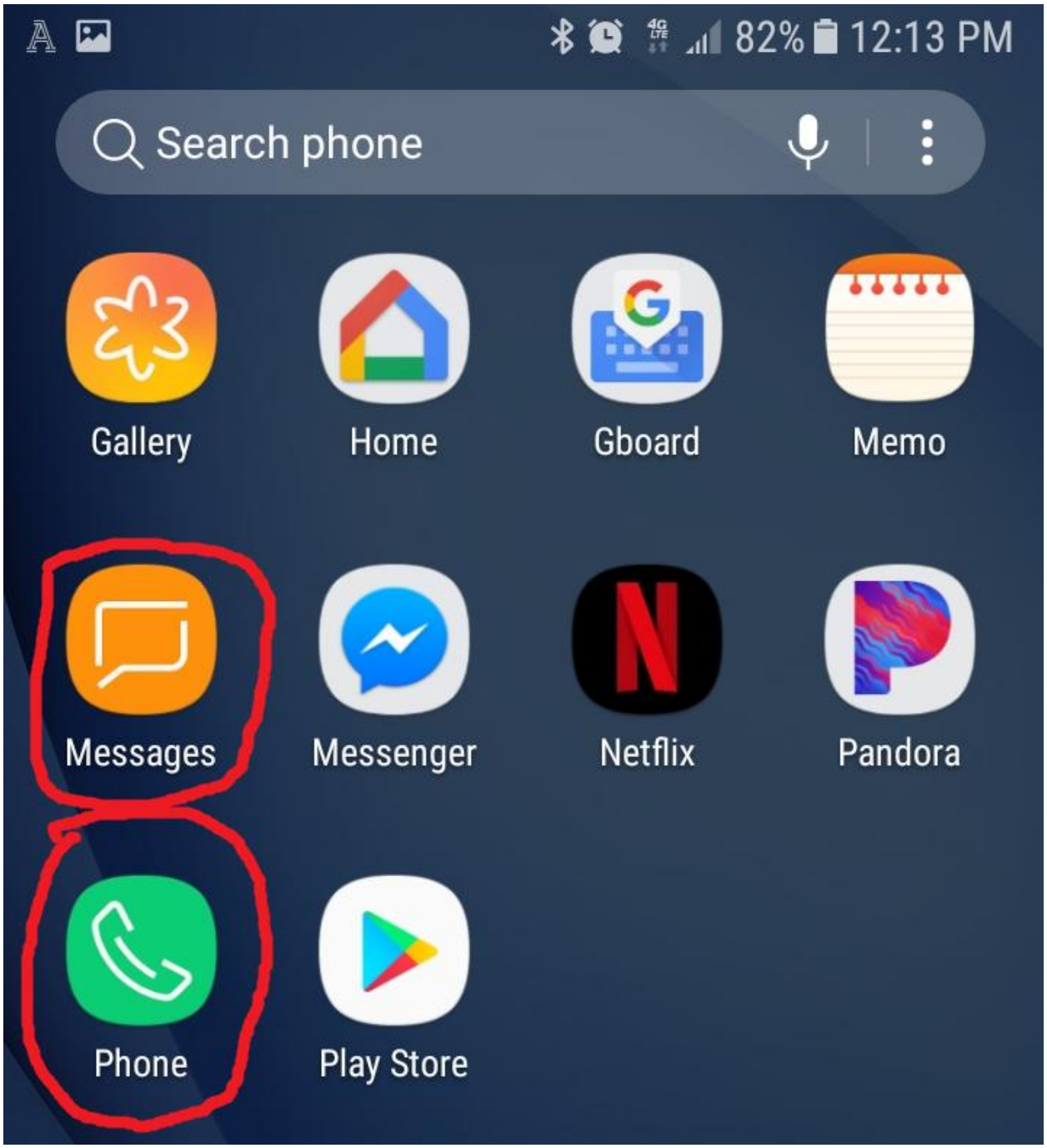
II. Smartphones are Not an ATDS.

As an initial matter, I agree that ordinary consumer use of a cellular smartphone should not be subject to the TCPA. However, a smartphone is itself hardware (a mini-computer). It's ability to do things is limited to its software (which makes it "smart"). My previous comments noted:

> [W]hat constitutes a *system* must be a case by case determination. If I have to download a software application to my device (smartphone or computer) to autodial, the *device* itself is not the *system* – the *system* is the software application which contains the necessary capacity to autodial. Of course, these functions could be spread out over multiple applications or devices, in which case they would together constitute a *system*. Callers will attempt circumvent any loophole created by the Commission, and the Commission should be careful not to create specific limitations which could be used by crafty telemarketers to circumvent the TCPA.

I reiterate this point. For the purposes of an ATDS, the smartphone is not the *system*. The system is the application that is capable of initiating a call. The smartphone is merely a computer that hosts the system. Below is screenshot from a Samsung Galaxy smartphone with the Android operating system. Circled in red are the factory default applications for making telephone calls and text messages. Each of these applications constitutes a system capable of making calls.

[9] *ACA Int'l* at 702-703.



The phone application makes voice calls. It does store telephone numbers in contacts, and it does dial numbers. However, it does not have the capacity to automatically dial telephone numbers from the contact list. It can only call one number at a time, and it requires the user to

sort through the contact list (or identify the specific contact by voice command) to manually generate the number to be dialed. The system itself cannot automatically call stored telephone numbers, and it cannot automatically generate a sequence of telephone numbers to be called. Every call requires a human to make a cognitive selection of who to call at the time the call is placed. Accordingly, the "phone" application is not an ATDS, and any call made using the application would not be subject to the TCPA.

The "messages" application is a closer call, merely because of its ability to make "group texts," which sends an identical text message to up to 20 contacts at a time.[10] However, the ability to send a personal group text to up to 20 recipients is not the type of communication the TCPA was intended to protect, and it makes sense for the Commission to consider an exemption similar to the one for ported telephone numbers in 47 C.F.R. § 64.1200(a)(1)(iv). The D.C. Circuit expressly approved of this approach in *ACA Int'l*.[11] I would propose the following as a starting point for discussion:

> Unless a call is made for telemarketing purposes or includes or introduces an unsolicited advertisement, a person will not be liable for violating the prohibition in paragraph (a)(1)(iii) of this section when the call is a text call which originates from the sender's personal cellular telephone as an outgoing SMS or MMS message through the sender's cellular carrier using the factory installed default text messaging application in a manner consistent with the cellular carrier's terms of service.

[10] Of course, the first SMS (short message service) text message was not sent until December 3, 1992, over a year after the TCPA was enacted. https://www.npr.org/2017/12/04/568393428/the-first-text-messages-celebrates-25-years. The application of section 227(b)(1)(A) to text messages has never been a perfect fit, and optimally Congress would set forth a separate category of prohibition, like it did with blast faxes. But given the statute as written, it makes sense for the FCC to craft some exemption for ordinary text messaging, just as it has issued an exemption for ported telephone numbers. *See* 47 C.F.R. § 64.1200(a)(1)(iv).

[11] *ACA Int'l v. FCC*, 885 F. 3d 687, 699 (D.C. Cir. 2018) ("The agency presumably could, if needed, fashion exemptions preventing a result under which every uninvited call or message from a standard smartphone would violate the statute.").

The purpose of the exception is to exempt ordinary use of a smartphone in a manner that does not permit telemarketers and other commercial callers to abuse the exception. By requiring the message be made from the factory installed text messaging application, it would prevent people from using blast text applications that far exceed the limited capacity of the factory text messaging applications used by most people. The purpose of requiring the call to originate as an outgoing SMS or MMS message through the caller's cellular carrier is to prevent people from using data connections or email-to-sms gateways[12] to send blast text messages. Finally, the requirement that such use be consistent with carrier's terms or service would generally help prevent abuse.[13]

III. Conclusion.

The Commission should affirm that a system that stores telephone numbers and automatically calls from a database of stored telephone numbers in an ATDS. The Commission could adopt the approach in *Marks*, which found that the phrase "using a random or sequential number generator" modified only "produce." In the alternative, the Commission could find that the phrase "using a random or sequential number generator" modifies "to be called," and it refers to the manner in which the telephone numbers are generated by the system from the stored

[12] The Commission has previously addressed this technology. *See Federal Communications Commission Omnibus Declaratory Ruling and Order*, CG Docket No. 02-275 WC Docket No. 07-135, ¶ 113-115 (released July 10, 2015); *See also Joffe v. Acacia Mortgage*, 121 P. 3d 831, 835-36 (Az. App. 2005).

[13] *See, e.g.,* T-Mobile Terms and Conditions (prohibiting "Misus[ing] the Service, including 'spamming' or sending abusive, unsolicited, or other mass automated communications[.]") available at https://www.t-mobile.com/templates/popup.aspx?PAsset=Ftr_Ftr_TermsAndConditions.

database to be called (at random or in some sequence as opposed to manual/cognitive selection), rather than how the initial dataset of telephone numbers is produced. Either approach is consistent with the D.C. Circuit's *ACA Int'l* decision, which focused more on the inconsistencies of the Commission's prior Orders without expressing preference to any specific approach.

Finally, the Commission should make clear that *ordinary* smartphone usage is not covered. As currently configured, factory default voice calling applications cannot make autodialed calls. Acknowledging that group texts present a special dilemma, the Commission should follow the D.C. Circuit's suggestion and craft an exemption for ordinary smartphone usage that still protects the privacy rights the TCPA was intended to protect.

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